Home Rule Analysis of S.B. No. 210 and H.B. No. 625

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S.B. No. 210 and H.B. No. 625 of the 132nd Ohio General Assembly are compatible with the home rule provisions of the Ohio Constitution. If enacted, each bill would have the characteristics of a general law that would operate to preempt conflicting local ordinances. To any extent that either bill would not completely preempt local measures, the exercise by the General Assembly of its home rule authority to limit local taxation would prohibit not only any local "tax" on auxiliary containers but also any local "fee, assessment, or other charge" that functions as a "tax."

1. S.B. No. 210 and H.B. No. 625 would preempt local measures.

Each bill would create a four-part statutory framework for regulation of auxiliary containers in the State of Ohio by: (a) adding Section 3736.01(K) to the Revised Code, to codify a detailed definition of the term "auxiliary container"; (b) enacting Section 3736.021, which would specifically provide that "[a] person may use an auxiliary container for purposes of commerce or otherwise," subject to the limitation that "[n]othing in this section shall be construed to prohibit or limit the authority of any county, municipal corporation, or solid waste management district to implement a voluntary recycling program"; (c) amending Section 3767.32(D) to include auxiliary containers within the scope of the anti-littering prohibitions of state law; and (d) exempting the sale, use or consumption of auxiliary containers, as well as auxiliary containers themselves and receipts received from sale of auxiliary containers, from any tax, fee, assessment or other charge by any municipal corporation (and, under H.B. No. 625, by any charter county or limited home rule township).

a. Limits of home rule authority. Municipal corporations have home rule authority under Article XVIII, Section 3, of the Ohio Constitution only "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws*." (Emphasis added.) *See also* Ohio Const., Article X, Section 3 (charter may provide for county exercise "of all or of any designated powers vested by the constitution or laws of Ohio in municipalities"); R.C. 504.04(A)(1), (2) (home rule townships may "[e]xercise all powers of local self-government . . . other than powers that are in conflict with general laws" and "[a]dopt and enforce . . . local police, sanitary, and other similar regulations that are not in conflict with general laws").

b. Local police power regulations. In the abstract, local measures to regulate auxiliary containers would be an exercise of the police power. *See generally Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St. 3d 96, 2008-Ohio-4605, ¶¶ 35-37 (firearms ordinance is an exercise of municipal police power because it "does not 'relate 'solely to the government and . . . internal affairs of the municipality'"; and "is aimed at curbing the regulated behavior for the general welfare of a municipality's citizens").

c. Statewide general laws. Local police power regulations may not conflict with general laws of the State of Ohio. Under *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, ¶¶ 21-36, a "general law" must "(1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally." The regulation of auxiliary

containers proposed by S.B. No. 210 and H.B. No. 625 is integrated and substantive, and would apply uniformly throughout the state not just to local governments but to "citizens generally."

d. Local police power regulations must not conflict with general state laws. The Supreme Court of Ohio has specified that "any local ordinances that seek to prohibit conduct that the state has authorized are in conflict with the state statutes and are therefore unconstitutional." *Am. Fin. Servs. Assn. v. Cleveland*, 112 Ohio St. 3d 170, 2006-Ohio-6043, ¶ 46. Local measures that impose "additional requirements" or otherwise "destroy[] the uniform application of a statewide statutory scheme," especially where the state has "occup[ied] the field and thereby preempt[ed] municipal regulation," conflict with general law. *Id.* at ¶¶ 43, 45, 47-48. *See generally Struthers v. Sokol*, 108 Ohio St. 263 (1923) (Syllabus ¶ 2) ("In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.").

2. The General Assembly may limit local taxation.

"[T]he Constitution confers power upon the General Assembly to limit the exercise of taxing power by a municipality." *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St. 3d 599, 605 (1998). Article XVIII, Section 13, provides that "[l]aws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes." Article XIII, Section 6, states with respect to municipal corporations that the General Assembly shall "*restrict their power of taxation* . . . so as to prevent the abuse of such power." (Emphasis added.) The Supreme Court confirmed in *Cincinnati v. Roettinger*, 105 Ohio St. 145, 156 (1922), that "the authority granted to municipalities to exercise powers of *local* self-government does not operate to take away from the legislature the power to place limitations upon taxation." (Emphasis in original.)

The General Assembly also may limit taxes by charter counties and limited home rule townships. *See* Ohio Const., Article X, Section 3 (charter may provide for county exercise "of all or of any designated powers vested by the constitution or laws of Ohio in municipalities"); Article X, Section 2 (township trustees "shall have such powers of local taxation as may be prescribed by law"); R.C. 504.04(A)(1) (home rule townships "shall enact no taxes other than those authorized by general law").

3. Fees and assessments are treated as a tax if they function like a tax.

For regulatory purposes, Ohio courts treat as a "tax" any "fee, assessment, or other charge" that functions as a "tax." Labels are not dispositive: "In order to determine whether certain assessments are taxes, we must analyze 'the substance of the assessments and not merely their form.'" *Drees Co. v. Hamilton Twp.*, 132 Ohio St. 3d 186, 2012-Ohio-2370, ¶ 15 (quoting *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St. 3d 111, 116 n.5 (1991)). "Determining whether an assessment is a fee or a tax must be done on a case-by-case basis dependent upon the facts and circumstances." *Withrow* at 115. Nor is there any "single test that will correctly distinguish a tax from a fee[.]" *Id.* at 117.

Certain judicially-recognized factors include: (a) whether "the entity imposing the assessment . . . is a legislative body, not a regulatory body, which favors characterizing the assessment as a tax" (*Drees* at ¶ 31); (b) whether there is "a specific charge in return for a service," because a genuine "fee is a charge imposed by *a government* in return for a service *it* provides" (*Withrow* at 113, 117) (emphasis added); and (c) whether the "fee" relates to the cost of the service or benefit (*Drees* at ¶ 39; *Roettinger* at 153-154). "When the ultimate use is to provide a general public benefit, the assessment is likely a tax, while an assessment that provides

a more narrow benefit to the regulated companies is likely a fee." *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgt. Dist.*, 166 F.3d 835, 838 (6th Cir. 1999).

Conclusion. As introduced, S.B. No. 210 and H.B. No. 625 conform to the home rule provisions of the Ohio Constitution.

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